No. 82-1739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FUNDACION EDUCATIVA ANA G. MENDEZ,
JOSE F. MENDEZ, *et al.*,

Petitioners,

—v.—

BERTA GALLEGO and
DIANA RODRIGUEZ DE AYGUABIBAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PUERTO RICO

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents* concede (indeed, affirmatively argue) that the sole source of the rights asserted below is an alleged private contract between respondents and the Foundation, that the Supreme Court of Puerto Rico did not rely upon or purport to construe the collective bargaining agreement in reaching its decision, and that the judgment below was based exclusively on the application of local contract law. They contend, therefore, that no federal question was presented or decided below.

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* As pointed out in respondents' brief in opposition to the petition ("Resp. Brief"), at 3 n.1, only two respondents, Berta Gallego and Diana Rodriguez de Ayguabibas remain in the case. The caption has been changed to reflect that fact.

That argument reflects a fundamental misunderstanding of the labor preemption doctrine. It is, of course, precisely the application of local law to regulate a field preempted by federal labor law that is at issue here. In any event, it is readily apparent from the face of the judgments below that the federal preemption question was presented and decided below. The Superior Court expressly considered and rejected petitioners' "jurisdictional arguments" based on federal law. (App. C, at 13a-17a)* The Supreme Court of Puerto Rico, in its judgment, makes specific reference to the "assignments of error," based on federal law, urged by petitioners, and goes on to consider (albeit cursorily) and decide the federal questions presented. (App. A, at 2a-3a)

Plainly, respondents' contention that no federal question is presented is flatly contradicted by the record.

2. Respondents also seem to suggest that the preemption doctrine should not apply here simply because the Commonwealth courts acted to protect alleged private contractual rights. As was pointed out in the petition for a writ of certiorari (at pp. 21-23), that view has repeatedly been rejected by this Court—most recently in *Local 926, Int'l Union of Operating Engineers* v. *Jones,* 103 S.Ct. 1453, 1462 (1983):

> We . . . cannot agree that Jones' efforts to recover damages from the Union for interference with his contractual relationships with his employer was of only peripheral concern to the federal labor policy. Our decisions in *Perko* and its companion case, *Plumbers Union* v. *Borden,* 373 U.S. 690 (1963) . . ., refute Jones' submission. They also foreclose any claim that Jones' action against the Union for interference with his job is so deeply

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* Appendix references ("App. ____, at ____") are to the Appendices to the Petition for a Writ of Certiorari.

> rooted in local law that Georgia's interest in enforcing that law overrides the interference with the federal labor law that prosecution of the state action would entail.

See also Viestenz v. *Fleming Companies,* 681 F.2d 699, 702 (10th Cir.), *cert. denied,* 103 S.Ct. 303 (1982) (affirming the dismissal of plaintiff's wrongful discharge claim "whether construed to sound in contract or in tort"). *Cf. Magnuson* v. *Burlington Northern, Inc.,* 576 F.2d 1367 (9th Cir.), *cert. denied,* 439 U.S. 930 (1978).

Nor is the private source of the alleged contractual rights relevant. As the Court concluded in *Garner* v. *Teamsters,* 346 U.S. 485, 501 (1953), federal law "cannot be curtailed, circumvented or extended by a state procedure simply because it will apply some doctrine of private right." To the contrary, "[t]o the extent that the private right may conflict with the public one, the former is superseded." *Id.*

Respondents would, nonetheless, apparently have the Court consider only the formal description of the legal standards applied below, and disregard the direct conflict of remedies that resulted from their application.

3. In their brief, respondents ignore the relevant proceedings before the federal agency invested by Congress with the primary authority to interpret and enforce the national labor laws and baldly assert that "respondents could not file charges before the National Labor Relations Board requesting reinstatement . . . ." (Resp. Brief, at 8) In fact, however, a charge contesting the termination of respondents' employment and seeking their reinstatement was filed with the National Labor Relations Board ("NLRB") on May 7, 1979. And, in a final and unappealable order, it was ruled that the Foundation had no obligation to reemploy respondents. (App. D, at 19a-20a; App. E, at 21a)

Similarly, in a footnote (Resp. Brief, at 9 n.*), respondents attempt to distinguish *Local 926, Int'l Union of Operating*

Engineers v. *Jones, supra,* 103 S.Ct. 1453, by stating that the unfair labor practice charge arising out of the unlawful strike in which respondents participated was addressed to union conduct, not that of respondents. That statement is disingenuous at best.

Respondents apparently refer to the unfair labor practice charge filed by the Foundation against the Asociacion de Maestros Universitarios ("the Association"), which resulted in a decision by the NLRB that the Association had violated Sections 8(b)(3) and (d) of the National Labor Relations Act ("the Act"). *Fundacion Educativa Ana G. Mendez,* 265 N.L.R.B. No. 3 (1982). They ignore—yet again—the unfair labor practice charge filed against the Foundation, in which it was alleged that the Foundation had violated the Act by unilaterally changing respondents' working conditions and by terminating their employment. With respect to that charge, the Regional Director and the General Counsel of the NLRB ruled that the Foundation had "no obligation to reemploy [respondents]" and "did not, as alleged, violate Section 8(a)(5) of the Act . . . by unilaterally changing working conditions." (App. D, at 19a-20a; App. E, at 21a)

Thus, the question of the legality of respondents' discharge not only could have been, but was presented to and decided by the NLRB.

4. Respondents' reliance on *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964) (Resp. Brief, at 9), is misplaced. *Carey* was a suit under Section 301 of the Act, 29 U.S.C. § 185, to enforce the arbitration provisions of a collective agreement. Here, however, respondents' action was not brought under Section 301 of the Act; it involved no claim that the Foundation had breached the collective agreement; and the court below did not rest its decision on the collective agreement. Decisions such as *Carey* v. *Westinghouse, supra,* permitting the exercise of judicial power, under Section 301 of the Act, to enforce collective agreements are, therefore, inapposite.

It also bears emphasis that, in *Carey*, there had been no NLRB ruling on the subject matter of the dispute before the Court. Indeed, the Court expressly noted that "[s]hould the Board disagree with the arbiter . . ., the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." 375 U.S. at 272. Here, of course, there was, prior to the judgment below, an NLRB ruling that the Foundation had acted lawfully in terminating respondents' employment. (App. D, at 19a-20a; App. E, at 21a) The court below nonetheless imposed liability on petitioners for conduct that the NLRB had ruled is permitted by the Act.

Respondents' brief in no way addresses this negation of NLRB jurisdiction and obvious frustration of national labor policy.

5. Respondents apparently concede that they were discharged for engaging in an unlawful strike in violation of Section 8(d) of the Act, 29 U.S.C. § 158(d). (Resp. Brief, at 2) It should nonetheless be noted that there is no question as to the illegality of their strike activity. On May 16, 1983, the Court of Appeals for the First Circuit entered an order (reprinted as Appendix A hereto) granting leave for the withdrawal of the petitions for review and the cross-applications for enforcement of the decision in *Fundacion Educativa Ana G. Mendez*, 265 N.L.R.B. No. 3 (1982). The NLRB decision that the strike in which respondents participated was in violation of Sections 8(b)(3) and (d) of the Act is, therefore, final.

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

June 24, 1983

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1848

ASOCIACION DE MAESTROS UNIVERSITARIOS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

FUNDACION EDUCATIVA ANA G. MENDEZ, INC.,
Intervenor.

No. 82-1876

FUNDACION EDUCATIVA ANA G. MENDEZ, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ASOCIACION DE MAESTROS UNIVERSITARIOS,
Intervenor.

ORDER OF COURT

Entered May 16, 1983

Upon motion,

Leave is granted the respective petitioners to withdraw their petitions for review and for the Board to withdraw their cross-applications for enforcement in the above-captioned cases.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By: /s/ Janice M. O'Neil
Senior Deputy Clerk.

A True Copy

Attest:

/s/ Janice M. O'Neil
Senior Deputy Clerk

[Cert. cc: N.L.R.B., Messrs. Acevedo Cruz, Dominguez, Garcia Passalacqua, Moore and Maram, Ms. Berkan.]